

UNITED STATES OF AMERICA
BEFORE THE MERIT SYSTEMS PROTECTION BOARD

In the matter of:	Docket No.
EUSEBIA ROQUE DE CRUZ	NY 752B70166-80-19

ORDER

Appellant petitioned the Commissioners of the former U.S. Civil Service Commission (now the Merit Systems Protection Board) to reopen and reconsider the Commission's Appeals Review Board (ARB) decision of October 23, 1978, which declined to review the Commission's Federal Employee Appeals Authority (FEAA) decision of May 31, 1977, dismissing appellant's appeal for lack of jurisdiction. For the reasons set forth below, appellant's petition is **DENIED**.

Appellant was an Office Services Supervisor in the Veterans Administration Center, San Juan, Puerto Rico. According to statements contained in her notice of appeal to the FEAA, appellant had, for some time prior to January 27, 1977, been dissatisfied with "unpleasant" working conditions in her office. On that date, appellant received what she believed to be unjust criticism from her supervisor. At approximately 2:00 P.M. that afternoon, she submitted her resignation, effective the following day, January 28, 1977. Appellant remained at work for the remainder of the day, but did not report to work on the 28th. On February 3, 1977, the agency processed her resignation. On February 10, 1977, appellant appeared at the agency to go through the exit clearance procedures. On February 11, 1977, appellant attempted to retract her resignation, but the agency declined to reinstate her, since the resignation had already become effective. Appellant filed an appeal with the FEAA on February 12, 1977.

The FEAA presiding official's first obligation was to determine whether or not the Commission had jurisdiction to hear the case. Pursuant thereto, he correctly sought to determine whether or not appellant's resignation was voluntary. The presiding official found that the employee's resignation was not the result of duress, time pressure, intimidation, or deception, nor made when appellant was suffering from any mental condition which precluded her from exercising free will or understanding the nature of her action. Based on these findings, he then determined that although the decision may have been made in haste, or while appellant was upset, there was no evidence to indicate that she was pressured into

her decision, or that she was incompetent to make such a decision at the time. Therefore, he found the resignation to be voluntary. Since the FEAA had no authority to consider the appeal of a voluntary resignation action, the presiding official dismissed the appeal as "not within purview." There is nothing in the record before the Board, including information provided in appellant's petitions, which indicates that the presiding official's factual or legal determination would be disturbed were the Board to grant review.

In her attempts to secure review of the agency's refusal to reinstate her, appellant has alleged generally that she has new and material evidence to present which was not available when the FEAA and ARB issued their decisions, that those decisions involved erroneous interpretations or misapplications of law, rule, regulation, or policy, and that those decisions were of a precedential nature involving new or unreviewed policy considerations having effect beyond the instant case. The Board has carefully reviewed those allegations, but finds no merit in any of them.

The additional evidence appellant would present was at all times available for presentation by appellant prior to the FEAA decision. In fact, subsequent statements by her representative tend to indicate that this evidence was not timely presented due to some lack of diligence on his part in pursuing this case. As stated earlier, even if properly within the "newly discovered evidence" rule, the nature of that evidence is not such as would tend to result in a different decision. The only significant evidentiary issue raised by appellant in her petitions relates to whether the agency improperly allowed her resignation to become effective despite her alleged request, made through her husband, that her resignation be withdrawn and she be placed on sick leave instead. The evidence before the Board, including the sworn statement of her husband, establishes that appellant's husband was unaware of her resignation at the time he telephoned her supervisor to report she was sick on January 28, 1977, that her supervisor unsuccessfully attempted to secure her reconsideration of the resignation during phone conversations with her husband on January 28, and 31, 1977, and that her supervisor held her retirement papers until February 3, 1977, hoping that appellant might reconsider her resignation before it was processed by the agency. Appellant, however, made no attempt to withdraw the resignation until February 11, 1977, even though she spoke to her supervisor by telephone on February 3, 1977, in order to set up an exit interview, appeared at the agency on February 10, 1977 to complete the exit clearance procedures, and spoke in person with her supervisor on that day.

Appellant's argument that the agency failed to give her a reasonable time to consider alternatives prior to accepting her resignation is based on an erroneous reading of the agency's regulations concerning resignations. The cited regulation is applicable only when the agency offers the appellant an opportunity to resign rather than face an agency proposed separation or adverse action. There were no such proposed actions in this case. Similarly, appellant's argument that the agency failed to inform her of her rights to file a grievance in contravention of FPM Supp. 296-31, overlooks the fact that this is required only in those cases where the agency records a reason for the employee's resignation that contradicts the employee's stated reason, which did not occur in this case. Finally, appellant identifies no policy considerations warranting review that have effect beyond the instant case, and the Board finds none raised on the record.

Accordingly, the petition for reopening and reconsiderations is DENIED. This is the final decision of the Merit Systems Protection Board on this case, and exhausts the administrative appeal rights.

For the Board:

ERSA H. POSTON.

January 29, 1980.

**UNITED STATES CIVIL SERVICE COMMISSION
FEDERAL EMPLOYEE APPEALS AUTHORITY**

New York Field Office, 26 Federal Plaza, New York, New York 10007

APPEAL OF EUSEBIA ROQUE

Under Part 752, Subpart B, of the Civil Service Regulations

Decision Number: NY752B70166

Decided on: May 31, 1977

INTRODUCTION

<i>Name of Appellant:</i>	Eusebia Roque
<i>Date of Appeal:</i>	February 12, 1977
<i>Department, Organization and Location:</i>	Veterans Administration Center San Juan, Puerto Rico 00936
<i>Action Appealed:</i>	Resignation from position of Office Services Supervisor, GS-0342, GS-8,

Step 4, \$14,038 plus 7.5% Cola, per annum

Effective Date:

January 28, 1977

COMMISSION JURISDICTION

Appellant was a career employee who had completed a required probationary period under the prescribed type of appointment. By letter dated February 12, 1977 the appellant sought to appeal her resignation, i.e., appeal the refusal of the Veterans Administration Center, San Juan, Puerto Rico to allow her to withdraw her previously submitted resignation of January 27, 1977, having an effective date of January 28, 1977. The appellant alleges she requested to be allowed to withdraw her resignation on February 11, 1977.

The agency submitted documentary evidence in respect to the appellant's resignation by letter dated March 9, 1977, which included the appellant's resignation statement and five statements from various individuals involved in the resignation and/or subsequent actions by or on behalf of the appellant. Copies of this information were furnished to the appellant by letter dated March 18, 1977, with an opportunity to respond and submit further representations. On March 28, 1977, the appellant acknowledged receipt of this information and requested an extension of time to submit additional dates. She was granted until April 15, 1977 to do so; nevertheless, no further representations were received. Our decision is therefore based upon the existing record.

The Civil Service Commission regards a resignation, initiated by an employee, to be a voluntary act. Such an action is subject to the Commission's appellate review only upon a showing by an employee that it was involuntarily obtained. The Federal Personnel Manual, FPM Supplement 752-1, Section S1-2 provides, in pertinent part, as follows:

S1-2. Voluntary and Involuntary Separations and Reductions

a. General. (1) Separations and reductions in rank or pay voluntarily initiated by an employee are by their very nature actions which do not require the use of adverse action procedures. On the other hand, a normally voluntary action-i.e., a resignation . . . at the employee's request is an adverse action for which the Commission will accept a timely appeal if it is obtained by duress, time pressure, intimidation, or deception. Whether an action is voluntary or involuntary is determined not by the form of the action, but by the circumstances that produced it . . .

(2) The Commission holds that an action requested by an employee is voluntary only if the employee has freedom of

choice. The general principle is that an action is voluntary if the employee is free to choose, understands the transaction, is given a reasonable time to make his choice, and is permitted to set the effective date . . .

b. Involuntary Actions

(2) *Employees not competent to choose.* The resignation of an employee whose mental condition precluded him from exercising free will, or from understanding the transaction, would be an involuntary resignation and thus void. When there is substantial medical and other evidence about an employee's mental condition which casts doubt on his understanding the alternatives involved, the agency should not encourage the employee's resignation. Instead, if the agency desires to separate the employee, it should initiate action to separate him by disability retirement or by adverse action procedures (see S1-3a(b)).

Appellant, in her letter of appeal, of February 12, 1977 described the circumstances surrounding her resignation which included, basically, complaints about her working relationship with her Division Chief and certain work-related problems, all occurring on January 27, 1977 and which culminated in the submission of her resignation to her supervisor, to be effective at 4:00 P.M. the next day, January 28, 1977. Appellant admitted in her letter of appeal that she did not appear at the Agency to request withdrawal of her resignation until February 11, 1977. She states also that on January 27, her supervisor told her he would do nothing with regard to her resignation until they discussed it the next day.

Appellant further relates that she was ill on January 28, and she alleges that on the following Monday she had her husband call the office and inform them that she was still ill; to hold the resignation; and to charge annual leave to her, despite the fact that she was ill. It should be noted here that by this day, January 31, 1977 her resignation was already effective.

A review of the record, which, as indicated above, contains statements from persons with personal knowledge of the circumstances surrounding the appellant's resignation, fails to reveal any indication or even allegation that appellant's resignation was solicited, that she was coerced into resigning; that there was any time pressure involved or that she was intimidated or deceived. Moreover, there is no evidence of any effort by appellant to contact her office until after the effective date of her resignation. In addition, the evidence submitted by the agency, and which is un rebutted, indicates that when appellant submitted her resignation to Mr. J.L. Rivera Alverio, Chief, Administration Division, she indicated that her decision was final.

Further, despite appellant's allegation that, when her husband called Mr. Alverio on January 31, 1977 to report that appellant was ill, he also requested that the resignation be held in abeyance, Mr. Alverio's statement clearly reflects that when he spoke to appellant's husband both on Friday, January 28, and again on Monday January 31, his attempts to question the latter brought forth the response that the resignation was not his concern, and that he wanted nothing to do with it. Nevertheless, even assuming the validity of this allegation, the appellant herself appeared in Mr. Alverio's office on February 10, 1977 but did not discuss an intention to withdraw her resignation. Instead, on February 10, appellant went through the normal Exit Clearance procedures with Mr. Barry Bell, Assistant Center Director and at that time mentioned the possibility of seeking employment with other Federal agencies. On the same day, the record indicates that she spoke to an acquaintance, Mr. Jose Lopez and stated to him that under no circumstances did she want to return to the Administration Division. On February 11, 1977 appellant spoke to Mr. Gilbert Gonzales, Chief, Personnel Services during which she expressed an interest in being reinstated or withdrawing her resignation and she also spoke to Mr. James Coira, Employee Relations Officer and stated she had resigned under stress and was willing to return if accepted. By February 11, 1977, however appellant's resignation had been accepted and the agency declined to permit her to withdraw it.

The remaining question to be determined regarding the voluntariness of appellant's resignation is whether or not she was competent to make such a decision at the time it was made.

We find after a thorough review of the facts as revealed in the evidence submitted, that appellant resigned voluntarily although she may have done so in haste and while upset. There is insufficient evidence to conclude that appellant's resignation was involuntary by reason of her mental state. No medical evidence was submitted to indicate she was not competent to make such a decision at the time she did so nor is there any other substantial evidence to indicate that appellant was incompetent. Further, as stated above, there is nothing to indicate that appellant's resignation was obtained by any prohibited means.

Appellant's resignation was effective January 28, 1977 at 4:00 P.M. FPM Supplement S1-1(b)(7) provides, with regard to the withdrawal by an employee of a resignation:

(7) Refusal to permit withdrawal of resignation. Since a resignation is binding on an employee once he has submitted it, an agency's proper use of discretion in refusing to permit withdrawal of a voluntary resignation before it becomes effective is not an adverse action . . . [Emphasis added].

On February 11, 1977, then, the agency was under no obligation to permit appellant to withdraw her resignation since it had already been made effective, nor was the agency required to reinstate appellant.

Since we find that appellant's resignation was voluntary, this office lacks the jurisdiction to adjudicate appellant's appeal.

DECISION

It is the decision of the Federal Employee Appeals Authority that the refusal of the Veterans Administration to permit appellant to withdraw her resignation after its effective date is not subject to the Commission's appellate review. Therefore, we cannot accept the appeal.

The decision of the appeals officer is final and there is no further right of appeal. This means that the decision of the appeals officer marks the exhaustion of those administrative remedies which must precede resort to the courts. However, section 772.310 of the Civil Service regulations permits the Commission's Appeals Review Board, in its discretion, and notwithstanding the exhaustion of the right of appeal or the pendency of suit, to reopen and reconsider any previous decision of an appeals officer when the party requesting reopening submits written argument or evidence which tends to establish that:

- (1) New and material evidence is available that was not readily available when the decision of the appeals officer was issued;
- (2) The previous decision of the appeals officer involves an erroneous interpretation of law or regulation, or a misapplication of established policy; or
- (3) The decision of the appeals officer is of a precedential nature involving new or unreviewed policy considerations that may have effect beyond the case at hand.

If the agency has evidence or argument which it believes meets one or more of these criteria, it must submit that information and, where appropriate, evidence of temporary or conditional compliance with this decision, not later than 30 days after receipt of the decision.

If the appellant has evidence or argument which she believes meets one or more of these criteria, she must submit that information within a reasonable time after receipt of this decision.

Such request should be sent to:

Chairman
Appeals Review Board
U.S. Civil Service Commission
Washington, D.C. 20415

For the Commission:

JOHN E. SELBMANN,
Chief Appeals Officer.

May 31, 1977.